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SUBJECT: Draft Constitution Includes Powerful Prime Minister,
Stronger Local Government

¶1. Summary: The Harmonized Draft Constitution proposes significant changes to executive powers, installs accountability mechanisms throughout government, ushers in a new house of parliament, reshapes the judiciary, and devolves power and some budgetary control to local governments. The document shifts Kenya from a powerful presidency to a hybrid system, with most affairs run by a cabinet headed by a prime minister. Potential stumbling blocks include executive power-sharing with a president; a prime minister who is not directly elected; the lack of a one person - one vote system; the details of devolution; and the recognition of Kadhi's courts for Muslim civil matters. The public comment period on the draft will end on December 17th. The Parliamentary Select Committee will then propose changes before the draft is sent to Parliament for discussion. Once Parliament approves the draft, it will be forwarded to the Attorney General for publication. A referendum could be held as early as April 2010. End summary.

¶2. (SBU) The Harmonized Draft Constitution of Kenya was released on November 17th and is being discussed during a one-month public comment period. Media outlets and civil society groups have done a poor job of explaining the 165-page document to the public, increasing the likelihood that changes will be decided by political parties when the draft moves to parliament for approval before a referendum can be held.

¶3. The draft moves most executive powers to a cabinet, headed by a prime minister. The president will cede most of his current power to Parliament and the cabinet, but will retain more than ceremonial duties. This system prompts concern over the creation of two centers of power. The draft also devolves more power to regional and county governments, removes the current office-holders for Attorney General and Chief Justice, retains Kadhi's courts for Muslim civil law, and creates independent commissions as a check on corruption and waste.

¶4. (SBU) The draft recalls many of the checks on executive authority contained in the Bomas draft, before they were weakened in the Wako draft that was eventually defeated in the 2005 referendum. The Bomas draft attempted to devise an equitable system of executive power sharing, created a second house of parliament, addressed devolution issues, and advocated a mixed member electoral system that was more responsive to popular will. The Wako draft weakened these provisions by allowing the president to unilaterally appoint the prime minister, maintained one house of parliament, kept the first-past-the-post electoral system allowing winners without a popular mandate, and maintained the top-down Provincial Administration system. The referendum failed largely due to weaknesses in executive power sharing and an inability to devolve power to local governments. The current draft attempts to correct those deficiencies.

Executive Powers

¶5. The executive power structure proposed in the draft constitution will weaken the presidency and vest most power in a cabinet headed by a prime minister. Currently, the president serves as the head of state and head of government, while the prime minister may only "coordinate and supervise" the affairs of government according to the power-sharing accord reached in February, 2008. Under the proposed draft, the president will serve as commander in chief of the armed forces, chair the National Security Council, and will appoint state office holders and approve legislation. The prime minister will serve as head of government and will run day to day operations through the cabinet. This transition will introduce a hybrid system, leaving the president with some executive powers. The prime minister will select no more than twenty cabinet ministers, who are subject to presidential approval. Up to ten cabinet ministers may come from outside parliament.

¶6. (SBU) Neither the president nor the prime minister will have

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unchecked power under the draft, representing a significant improvement from what Kenyans term the current "imperial presidency." The president's decisions on appointments and legislation will be subject to parliamentary approval. As the president will not be allowed to hold high office in a political party, that position could serve as a less-politicized check on the cabinet. The prime minister must rely on presidential approval for his appointments. He will serve as the most powerful figure in parliament, but the cabinet will serve as a deliberative body that could check some powers of the prime minister.

¶7. Some commentators are wary of a system where the prime minister is not directly elected. The prime minister will be selected by parliament and will be the head of the largest party or coalition. While he or she will not be directly elected, voters will know their party leaders before voting for their individual members of parliament. Accountability will derive from the threat of a no confidence vote if the coalition fails. Some advocate for a mixed member proportional system where votes are cast for a member of parliament and a governing party. The leader of the party with the most votes would then become prime minister.

¶8. The president and prime minister will have little power to remove each other from office. The president must approve the leader of parliament as prime minister and cannot put forth his or her own candidate. Once in office, the prime minister can only be removed by a vote of no confidence, and cabinet officials can only be removed by the president on the advice of the prime minister. The president can only be removed by impeachment through a two thirds vote in parliament, and only for incapacity or serious breaches of the constitution or law.

¶9. The president will have little direct influence on domestic affairs, either through approving legislation or directing cabinet ministries. If the president vetoes legislation, parliament can ultimately overrule his decision by a simple majority vote. The president has no authority to direct cabinet ministries and can only advise the prime minister on domestic issues. The prime minister's only constitutional obligation to the president is to keep him "regularly informed concerning the general conduct of government."

¶10. The president and prime minister overlap in the areas of defense and foreign affairs. While the president will serve as commander in chief, chair of the National Security Council, and can commit troops with parliamentary approval, the cabinet will oversee

the Ministry of Defense. The president may also appoint diplomatic officials and sign international treaties with parliamentary approval, while the cabinet will oversee the Foreign Ministry. The policy divide between the two is unclear. This will likely result in public disagreements, but the prime minister will be empowered to guide policy through the cabinet on most issues.

Empowering Local Government

¶11. The proposed system of devolved government will give regions and counties greater power to collect taxes and coordinate their own affairs, though the size of the bureaucracy is likely to increase as a result. The current Provincial Administration system is directed mainly by the national government and there is little budgetary or policy independence at the local level. This system will be eliminated under the draft by creating eight regional governments and 74 county governments. Each government will have its own assembly, executive, and civil service staff.

¶12. Devolved government will aim to remove the current top-down approach where Nairobi dictates most policies to provincial governments. Each region and county will be able to levy taxes to support its activities, and will have greater control over its own budget though some linkages with the national government will remain. The proposal is embraced in many regions, especially by the Muslim community in Coast province who want greater autonomy to run their own affairs. Opponents argue that operating national, regional, and county governments is excessive and not financially feasible.

New Structure of Parliament

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¶13. Two houses of parliament are established in the draft: a National Assembly based on the current constituency system and a Senate with representatives from all the newly-created counties in Kenya. The National Assembly will retain most of its current powers. The Senate will be more responsive to the needs of devolved governments given its connection to counties. Speakers of both Houses of Parliament will be elected from candidates who are not members themselves. No members of parliament may be appointed.

¶14. The National Assembly will hold greater powers than the Senate. Both houses must consent on most legislation, but the Senate's assent is not required on bills relating to financial issues or appropriations. The Senate does have primary responsibility for presidential impeachment hearings, though the petition must originate in the National Assembly.

¶15. Women, minorities and disabled citizens stand to make parliamentary gains through set-asides. Women will comprise at least one third of the seats in the National Assembly, which will be partly achieved by each of the 74 counties electing a woman to the 299 member body. The Senate elects two women from each region, representing 16 women in the 99 member body. Set asides will also benefit the disabled, marginalized communities, and youth to a lesser degree.

¶16. Political parties are concerned about the lack of a one person, one vote system in the draft given that the prime minister will be elected from the National Assembly. Currently there is no proportional representation among constituencies with the smallest constituency holding the same number of votes in the National Assembly as the largest which has eighteen times the population. If the prime minister is to be elected from members of the National Assembly, constituencies roughly equal in population will be needed

to equalize votes in parliament. The Independent Electoral and Boundaries Commission will play a key role in establishing constituencies, but they have few specific guidelines in the draft regarding how to achieve parity.

Judicial Vetting and Kadhi's Courts

¶17. The judiciary will be revamped with the addition of a Supreme Court and separate Constitutional Court among the superior courts. Commentators question the need for another body given the existence of the current High Court, Court of Appeals, and Constitutional chamber within the Court of Appeals. The Supreme Court will be the superior body, except in cases of election petitions in which case the Constitutional Court will have final jurisdiction.

¶18. All current judges will either retire or submit to a vetting process before they can be reappointed under the new constitution. Judges oppose this process as it places a greater burden on them than on other public officials, such as members of parliament who will retain their seats until the next election and are not subject to vetting. However, independent commentators support vetting as the only way to root out corruption in the judiciary. An Interim Judicial Services Commission will vet each judge. The Commission will be appointed by the prime minister and consist of two non-citizen judges, two Kenyan judges, and an advocate.

¶19. The draft retains the Kadhi's court's jurisdiction over civil issues between Muslims, despite growing opposition among Christian leaders. Muslim leaders call for expansion of the courts throughout Kenya. Christian leaders call for removal of the Kadhi's courts altogether, amid fears of an expansion of sharia law. The Kadhi's courts have been in place for decades and have operated alongside civil courts, but both sides are using the draft as an opportunity to rekindle debate on the scope of the courts. The draft calls for a separation of religion and state, and declares that all religions should be treated equally.

Accountability and Anti-Corruption

¶20. New regulations increase independence of the police and prosecutors. The position of Inspector General of Police will be created to run the police service, in lieu of the internal security minister directing the police commissioner under the current system. The internal security minister may direct the inspector general on policy issues, but may not request or interfere with specific

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investigations. A new Office of Public Prosecutions will be independent of the attorney general, and a new Office of the Public Defender will coordinate legal aid to the indigent. (Note: Under current law, only indigent defendants charged with capital crimes are entitled to representation. End note.)

¶21. The current attorney general, chief justice, and auditor general must all be removed and replaced by new office-holders under the draft. The chief justice may serve on the Court of Appeals if he is vetted by the Interim Judicial Services Commission. No provisions are made for future positions for the attorney general or auditor general.

¶22. Members of parliament will be required to pay taxes and publicly declare their assets under new regulations. The independent Salaries and Remuneration Commission will set salaries for all public officials, including members of parliament. The controller and the auditor general are separated into two offices and are not subject to direction from any other organ of government. Finally, all state officers, including parliamentarians and judges, must submit asset declarations that will be made

available to the public.

¶23. The Ethics and Anti-Corruption Commission (EACC) will replace the Kenya Anti-Corruption Commission. The new body will have the authority to receive and investigate complaints, but must refer complaints to "relevant authorities" for action. The relationship between the EACC and prosecutors or the judiciary is unclear. The EACC will also maintain a register of assets for state officers and make it available to the public.

Timeline and Process

¶24. A referendum on the draft constitution is unlikely to be held before July 8, 2010 at the earliest. The public comment period will end on December 17th, though there have been calls for a two month extension. If no extensions are granted, the Committee of Experts (CoE) which oversees drafting will incorporate public comments and present a new draft to the Parliamentary Select Committee (PSC). The CoE will then receive comments from the PSC and return a new draft to the National Assembly by late February, 2010. Parliament then has fifteen days to review and approve the draft, or submit it back to the CoE for more revisions. If revisions are requested, the CoE will return the draft within seven days at which time the draft must be approved by Parliament within 14 days.

¶25. (SBU) An April referendum is being talked about, but seems unlikely. The Interim Independent Election Commission is still in the early stages of organizing itself. July seems a more likely target date for a referendum, given the need to complete a new electoral registry and to carry out other preparations. The referendum will be in danger if it is delayed to mid-2010 as attention shifts to the pre-election period. A politicized debate could derail the process if key personalities make their aspirations known within the context of the draft ahead of elections. It is essential that President Kibaki and Prime Minister Odinga reach agreement on the structure of executive power in order to avoid a divisive referendum, which would be disastrous for the country.

¶26. If a referendum passes, parliament will face great burdens to implement the constitution and may be dissolved if it refuses to do so. At least 72 bills must pass in order for the constitution to take full effect: two within six months, 34 within one year, 22 within two years, and 14 within three years. Parliament may extend the timeline for any bill by one year with a two thirds vote. Ultimately, if parliament does not pass the required implementing legislation, the Chief Justice must petition the President who must dissolve parliament and call for new elections. A newly elected parliament would then be responsible for passing implementing legislation for the new constitution.

Potential Stumbling Blocks

¶27. (SBU) Diverse interest groups are opposing provisions of the draft, prompting fears that they could unite in a loose coalition to defeat a referendum. The division of executive power is controversial among political parties who want to retain either a powerful presidency or a true parliamentary system with only a

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prime minister. Various Christian groups, including powerful church leaders, are opposed to the retention of the Kadhi's courts. They may campaign to oppose the draft even though to do so would maintain the status quo which includes the courts. The judiciary is opposed to the vetting requirement as it violates their security of tenure. Some judges would accept the vetting mechanism, but only if they continued to serve during the vetting process. To date, interest groups have not coordinated efforts, but this could change

if the draft moves towards a referendum. We are in touch with key interest groups and the political leadership in an effort to encourage compromise and broad support for the final draft.

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